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No. 96-1553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ERNST & YOUNG LLP,

Petitioner,

v.

P. LARUE SIMPSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR SIXTEEN LAW FIRMS IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* FOR SIXTEEN LAW FIRMS IN SUPPORT OF THE PETITION

The following law firms (collectively, "*amici*"), hereby move pursuant to Supreme Court Rule 37.2, for leave to file the attached brief as *amici curiae*:

Arnold & Porter

Davis Polk & Wardwell

Dickinson, Wright, Moon, Van Dusen & Freeman

Fried, Frank, Harris, Shriver & Jacobson

Fulbright & Jaworski L.L.P.

Jones, Day, Reavis & Pogue

King & Spalding

Latham & Watkins

O'Melveny & Myers LLP

Paul, Hastings, Janofsky & Walker LLP

Seyfarth, Shaw, Fairweather & Geraldson

Shearman & Sterling

Skadden, Arps, Slate, Meagher & Flom LLP

Vorys, Sater, Seymour and Pease

Weil, Gotshal & Manges LLP

Wiley, Rein & Fielding

Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has not.

The *amici* are law partnerships with a diverse array of national and regional practices. Formed in different jurisdictions around the country, each firm has structured itself and its affairs in accordance with, and in reliance on, the law of the state in which it is organized. As a consequence, *amici* represent a broad range

of partnerships with differing approaches to management, profit-sharing, liability, and compensation.

The decision below — which appears to forge a new, general federal definition of partnership divorced from specific state partnership laws — is a matter of substantial concern for the *amici*, as it creates considerable uncertainty about partnership obligations and responsibilities under federal laws such as the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. *Amici* have relied on specific state partnership laws to create business structures that are competitive in today's legal market. By requiring partnerships to conform to general federal criteria that are different from and inconsistent with specific state partnership rules, the decision below might impel the restructuring of partnerships and impede law firms' ability to respond to changing economic conditions. It would also undermine the states' authority to create new forms of business associations like the Limited Liability Partnership, a recent innovation that several of the *amici* have already embraced.

Because of their significant experience in structuring and operating law firm partnerships across the country, *amici* bring a unique perspective to this case. The attached brief illustrates the adverse effect of the decision below on law firms and other business partnerships and focuses on issues that the principal parties may not present.

For these reasons, the Court should grant this motion for leave to file the attached brief *amici curiae* in support of the petition for certiorari.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are sixteen law firms with a diverse array of national and regional practices.[2] Formed in different jurisdictions around the country, each firm has structured itself and its affairs in accordance with, and in reliance on, the specific law of the state in which it is organized. As a consequence, *amici* have different management and financial structures as well as different practices. What they all share, however, is a vital interest in preserving their freedom to structure legal relationships between and among their partners in mutually agreeable and economically productive ways.

The decision below threatens that freedom. In a ruling contrary to this Court's teaching, the Sixth Circuit fashioned and applied a judge-made, general federal definition of partnership that is considerably more restrictive than the state definition of partnership that it should have applied. Indeed, if allowed to stand, the new federal definition would raise questions about the validity of partnerships organized under the specific laws of every state. *Amici* therefore submit this brief in support of Ernst & Young's petition for certiorari.

INTRODUCTION AND SUMMARY

The threshold question in the case below was whether or not plaintiff LaRue Simpson was a partner in the accounting firm of Ernst & Young. *See Simpson v. Ernst & Young*, 100 F.3d 436, 439 (6th Cir. 1996). Simpson sued the firm under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, but Ernst & Young contended that as a co-owner and partner of the firm, Simpson was not an employee protected by either statute. *Simpson v. Ernst & Young*, 850 F. Supp. 648, 649-50 (S.D. Ohio 1994).

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[1] No counsel for any party had any role in authoring this brief, and no person other than the named *amici* and their counsel made any monetary contribution to its preparation and submission.

[2] *Amici* are described in the Appendix to this brief.

Since federal courts unanimously agree that the ADEA and ERISA protect only employees, and not business partners, *see Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404, 408 (9th Cir.) (ERISA), *cert. denied*, 116 S. Ct. 377 (1995); *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1401 (11th Cir. 1991) (ADEA); *Wheeler v. Hurdman*, 825 F.2d 257, 274-75 (10th Cir. 1987) (ADEA, Title VII and Equal Pay Act), *cert. denied*, 484 U.S. 986 (1987); *Robertson v. Alexander Grant & Co.*, 798 F.2d 868, 870-71 (5th Cir. 1986) (ERISA), *cert. denied*, 479 U.S. 1089 (1987); *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 797 (2d Cir. 1986) (ADEA, Title VII), Simpson had to show that he was not a bona fide partner in Ernst & Young, even though he had always regarded himself as one until he was forced to resign. *See Simpson*, 850 F. Supp. at 654.

Both the district court and the court of appeals created and applied a general federal definition of partnership to determine whether the plaintiff was a bona fide partner. The district court found "guidance as to the nature of partnership" in the Uniform Partnership Act ("UPA") and federal case law, *id.* at 657, after reviewing, but ultimately rejecting, the elements of partnership established under the law of New York, the state where Ernst & Young was organized. *See, e.g.*, *id.*, at 662-63 (acknowledging that New York law permits partners to delegate all of their management power, but ruling that "at some point, delegation destroys partner status"). *Cf.* N.Y. Partnership Law § 40; *Tenney v. Insurance Co. of N. Am.*, 409 F. Supp. 746, 749 (S.D.N.Y. 1975) (under New York law, partner's complete lack of voice in partnership governance did not show lack of "partner" status). The Court of Appeals for the Sixth Circuit did not even consider New York law; it simply looked to the UPA and federal case law to derive a laundry list of partnership criteria. *Simpson*, 100 F.3d at 443-44. "[E]valuating the undisputed facts . . . against the common-law principles as codified in the UPA," the Sixth Circuit decided that Simpson was not a partner in Ernst & Young for purposes of the ADEA and ERISA. *Id.*

Whether someone is a bona fide business partner — and thus not an employee with standing to sue under federal employment

statutes like the ADEA and ERISA — is a question of federal law, but that does not "make state law irrelevant." *Burks v. Lasker*, 441 U.S. 471, 477-78 (1979). A court can interpret a federal statute either by creating general federal rules of decision or by employing existing state law, and the presumption is that a court "should incorporate state law as the federal rule of decision." *Kamen v. Kemper Financial Serv. Inc.*, 500 U.S. 90, 98 (1991) (internal quotation and brackets omitted). Indeed, unless a uniform rule of decision is needed, or unless the application of the particular state law in question "'would frustrate specific objectives of the federal programs,'" this Court has ruled that a federal court must apply state law in interpreting a federal statute. *Id.* (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)).

The Sixth Circuit, however, ignored the state partnership law of New York, where Ernst & Young was formed. It did not consider whether the state-law definition of "partner" would conflict with the goals of the ADEA or ERISA; nor did it consider the effect that a national partnership law would have on commercial relations predicated on state law. It made no finding that the ADEA or ERISA require a uniform definition of "partnership." In short, it made none of the analyses required by this Court before creating federal rules of partnership based on "the common-law principles . . . codified in the UPA," that it then said Ernst & Young had failed to meet. *Simpson*, 100 F.3d at 443-44.

By failing to give specific state partnership law controlling effect in determining who is a partner under the ADEA and ERISA, the Sixth Circuit has created a federal body of partnership law divorced from the particular state laws that business partners rely upon in forming their associations. The immediate effect of this decision is manifest: a bona fide partner under state law was held not to be a partner under federal law. Worse yet, the characteristic of the partnership that the court seemed to find most inappropriate is one of the more common features of large and even medium-sized partnerships: the partners' delegation of management responsibility to an executive committee. Most

states allow partners to agree to delegate their management rights, but the new federal rules of decision announced by the Sixth Circuit apparently would not do so. Bona fide partnerships may thus feel constrained to reorganize their management structures to conform with the new federal partnership rules — or face potentially crippling liabilities under ERISA, the ADEA, and Title VII when their non-managing partners are found to be employees.

Creating and regulating business associations is traditionally a state role, yet the decision below creates a federal standard for partnership formation that is inconsistent with most states' laws. Having competing rules of partnership under federal and state law would inject uncertainty into partnership formation and place dealings among partners "under a federally created cloud." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). Moreover, states will no longer be able to respond effectively to business needs by inventing new, innovative approaches to partnership, for partnerships will still have to conform to the Sixth Circuit's criteria for partnership. Because the Sixth Circuit's decision will cause the very problems that this Court sought to avoid when it required federal courts to consider whether to apply existing state law before fashioning an independent federal rule of decision, certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FORCES VALID STATE PARTNERSHIPS TO RESTRUCTURE, THREATENS THEM WITH UNEXPECTED LIABILITIES, AND UNDERMINES STATE SOVEREIGNTY.

The effect of the Sixth Circuit's failure to follow this Court's teaching will be manifold. Since the general, federal partnership rules that it created differ significantly from most state laws, countless partnerships that are bona fide under state law may be impelled to restructure to conform with the new federal rules. If they do not reorganize, they risk potentially crippling liabilities if their former business partners bring suit under federal employee-protection statutes like the ADEA and ERISA. Moreover, the existence of a general, federal law of partnership

could stymie some of the states' recent and popular innovations in partnership law and hinder the states' ability to respond to changing economies by creating new forms of business association like the limited liability partnership.

A. The decision below would require partnerships to restructure.

In essence, the Sixth Circuit required Ernst & Young partners to meet the default provisions of the Uniform Partnership Act in order to be considered "partners" under federal law. *Simpson*, 100 F.3d at 443-44. The UPA provides a "standard form contract" that is designed for the small, "closely held business in which all of the owners are active participants and the departure of any owner usually has significant consequences." I A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership*, § 1.02(b), at 1:25-26 (1996). Since partnerships are as varied as the businesses in which they engage, all state partnership statutes allow partners to reject the standard form of partnership of the UPA and tailor their relationship through their partnership agreement to meet the particular needs of their business. *Id.*; *see, e.g.*, N.Y. Partnership Law § 40.

The decision below effectively negates these long-standing state laws, for purposes of the ADEA, ERISA, and other federal employment laws, by holding a partnership to the standards set out in the UPA rather than the standards established in its partnership agreement or even in its own state's statute. Virtually all of the factors that the court listed — the right to participate in management, the ability to control and operate the business, voting rights, the right to act as agent, the right to share in the profits, the duty to share in losses, exposure to liability, fiduciary duty, employment security, investment in the firm, ownership of firm assets, and compensation based on profits, *Simpson*, 100 F.3d at 443-44 — are elements that New York law, for example, allows the partners to reject, either by agreement or by registering with the State. N.Y. Partnership Law § 40 (allowing partners to agree to vary or eliminate the right to participate in management, the ability to control and operate the business, voting rights, the

right to share in the profits, the duty to share in losses, employment security, investment in the firm, and compensation based on profits); *id.* § 51 (allowing partners to agree to vary or reject co-ownership of firm assets); *id.* § 121-1500 (allowing partners to register for limited liability status that eliminates their individual exposure for the partnership's liabilities). Under the Sixth Circuit's rules, however, partners could not vary or eliminate any of these standard-form features without risking the validity of their partnerships under federal law.

The problem, of course, is that most modern partnerships are based on partnership agreements that *do* vary and even eliminate one or more of the partnership features provided by the UPA default provisions. The standard form of partnership is a far cry from the modern, complex partnerships that predominate business today. *See* Richard, *How Firms Manage*, 18 Pa. Law. 20, 22 (1996); I A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership*, § 1.02(b), at 1:25-26.

The legal profession provides an apt illustration of how out of step the standard form of partnership — the form that the Sixth Circuit would impose on all partnerships — is with modern economic conditions. As a consequence of the dramatic growth that law firms and partnerships have experienced over the past few decades, most law-firm partnerships have adopted some form of centralized management. Richard, *How Firms Manage*, 18 Pa. Law. at 22; Smith, *After the Flood: How Strategic Planning Helped One Firm Weather Changing Times*, 11 Of Counsel 4, 5 (Feb. 3, 1992); *see* Samuelson, *The Organizational Structure of Law Firms: Lessons From Management Theory*, 51 Ohio St. L.J. 645, 652 (1990) (explaining that "[l]eadership in law firms is exercised by one or several managing partners"); *see generally* R. Nelson, *Partners With Power: The Social Transformation of the Large Law Firm* 91 (1988) (describing traditional law firm management as involving "direct administration by leading lawyers, aided only by a part-time managing partner, with no regular monitoring of internal performance measures or financial information"). Even firms with just 12 to 15 partners find that the democratic governance typical of UPA "standard form"

partnerships is "too cumbersome to be practical." Richard, *How Firms Manage*, 18 Pa. Law. at 20. Such firms usually delegate management and control to committees that handle the details of day-to-day governance. Larger firms find that committee-style governance can be as unwieldy as democratic governance, and "typically organize in a more hierarchical fashion." *Id.* at 21. Some have even adopted corporate-style matrix organizations, complete with CEOs. Samuelson, *The Organizational Structure of Law Firms: Lessons From Management Theory*, 51 Ohio St. L.J. at 671-72 n.194.

The move toward centralized management is not peculiar to law firms, however, for it stands to reason that increases in size, regardless of line of business, "create[ ] pressure on organizations to rationalize their structures by developing more sophisticated managerial and administrative frameworks." Samuelson, *The Organizational Structure of Law Firms*, 51 Ohio St. L.J. at 645; *accord* II A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership*, § 6.03(b), at 6:39-40 (1996). It is not difficult to see why the UPA's provision for "equal control" is ill-suited to efficient business operation in an organization of any appreciable size. "Democratic governance often fails to produce a coherent managerial approach and the time required to reach decisions is substantial." *Id.* at 652; *see* Richard, *How Firms Manage*, 18 Pa. Law. at 20. Moreover, when professionals are required to consider, debate and vote on even the most trivial aspects of doing business — such as negotiating and renegotiating leases and employment contracts — they have considerably less time in which to practice their professions and generate income for themselves and their firms. Many professionals prefer to leave the more mundane aspects of business operation to a process agreed upon in a partnership agreement.

Unfortunately, they may no longer have that choice. Partnerships that want to ensure that they measure up to the rule of law established below may have to reorganize their management structure to conform to the UPA's standard form. While it is true that the court below created a general, multifaceted federal test for partnership, it is also true that three

of the eleven factors that it listed — the right to participate in management, the ability to control and operate the business, and voting rights — would require a more traditional management structure than many modern firms have.

Moreover, many of the remaining factors of the Sixth Circuit's test (such as exposure to personal liability and compensation based solely on ownership share) are similarly lacking in modern partnerships. *See, e.g.*, Keating, Donn, Coleman & Hester, *Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Business Organization*, 51 Bus. Law. 147, 147 (1995) (discussing development of limited liability in modern partnerships); Smith, *After the Flood*, 11 Of Counsel, at 6 (discussing performance- and responsibility-based partner compensatic 'n modern partnerships); *Partner Compensation: How Three Firms Split the Take*, 95-5 Compensation & Benefits for L. Off. 1 (1995) (same). Contrary to the assumption of the court below, it is not uncommon for partnerships to base profit distribution on partner performance rather than on some ownership formula, II A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership*, § 6.02(b), at 6:11-12, just as it is not uncommon (as some of the *amici* can attest) for firms to assist new partners in getting loans to cover the cost of their capital contributions. In fact, many modern professional services partnerships have all three features: centralized management, assistance in securing loans for capital contributions, and performance-based partner compensation. If such firms want to ensure that their partners are considered bona fide under federal law, they may have to reorganize their business and financial structures to meet the new federal criteria.

B. Under the decision below, partnerships that do not restructure may be subject to huge, unanticipated liabilities.

Since conforming to the Sixth Circuit's idea of partnership would entail the adoption of unwieldy management structures, inappropriate compensation models, and individual exposure to unlimited liability, many modern partnerships may prefer to retain

their current, state-approved form. Doing so, however, could invite lawsuits from disgruntled former partners who could point to the firm's centralized management, performance-based compensation, and other modern features to show that they were really "employees" under the Sixth Circuit's test, despite their status as bona fide partners and co-owners under state law.

If bona fide partners under state law can be "employees" under the ADEA, for example, partnerships with a mandatory retirement age for partners may find themselves unexpectedly subject to lawsuits for age discrimination. As employers, business partners cannot discriminate against their employees based on age. But partners can agree amongst themselves that they will retire from active participation in the business when they reach a certain age. Such agreements, which are not uncommon, do not violate the ADEA when they apply only to bona fide partners. *See, e.g.*, Schwidetzsky, *Is It Time to Give the S Corporation a Proper Burial?*, 15 Va. Tax Rev. 591, 622-23 (1996) (noting that accounting firms "often have mandatory retirement ages for partners"). But if a partner who agreed to mandatory retirement later claims that he was actually an employee under the Sixth Circuit's criteria, he could sue the partnership for age discrimination under the ADEA even if he was an admittedly bona fide partner under state law.

More importantly, business partners will suddenly find that their benefits and pension plans could now be subject to ERISA. *See Simpson v. Ernst & Young*, 879 F. Supp. 802, 828 (S.D. Ohio 1994) (finding partnership liable for over $700,000 in ERISA damages after finding that "partner" was an "employee"). ERISA does not cover retirement plans that include only partners. 29 C.F.R. § 2510.3-3(b), (c)(2); *see Robertson*, 798 F.2d at 871. But a pension plan that includes even *one* employee is subject to ERISA's participation, funding, and vesting requirements. *Ehrlich v. Howe*, 848 F. Supp. 482, 486 (S.D.N.Y. 1994); *see Simpson*, 879 F. Supp. at 812, 814-15. If a partnership fails to restructure to conform to the Sixth Circuit's federal partnership rules, a federal court could rule that its partner pension plan includes employees, even where all of the participants in the plan

are bona fide partners under the applicable state law. If one or more of those partners fails to meet the federal partnership criteria set out in the decision below, the partnership may well find itself subject to huge, and potentially crippling, liabilities for unfunded pension benefits.

C. The new federal rules fashioned by the lower court undermine the states' ability to foster business development.

The decision below would upset not only the expectations of business partners who relied on particular state laws in forming their partnerships, but also the ability of the states themselves to respond effectively to business needs. Creating and regulating business associations is traditionally a state role, but the decision below establishes a general, federal standard for partnership formation that is inconsistent with most states' laws. Since partnerships will have to conform to the new federal law of partnership as well as any state standards, any attempt by the states to respond to changing business conditions by changing the parameters of partnership law could be ineffective. The decision below could thus effectively freeze the evolution of partnership law.

That freeze would come during the midst of a major overhaul of state partnership law. The past few years have seen both the complete revision of the Uniform Partnership Act and the birth (and rapid growth) of the Limited Liability Partnership. A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Limited Liability Partnerships and the Revised Uniform Partnership Act* xvii (1997). After the savings-and-loan debacle in the 1980s resulted in a slew of malpractice suits against the law and accounting firms that had done work for failed savings-and-loans, the limitations of the traditional partnership form came home to roost, for even partners who had nothing to do with their firms' savings-and-loan work were held liable for their partners' conduct. *Id.* at 3. Business owners lobbied for another option, and states seeking business development responded by creating the

Limited Liability Partnership. *Id.*; Keating, Donn, Coleman & Hester, *Limited Liability Partnerships* 51 Bus. Law., at 158.

Limited Liability Partnerships ("LLPs") are general partnerships subject to all of the same laws as regular partnerships, with the added benefit that the partners are not individually liable for the debts and liabilities of the partnership. Thus, a modern partnership with centralized management and performance-based compensation can register for limited-liability status that protects the partners from personal liability. Since an LLP is the same general partnership that it was before it registered, *see, e.g.*, N.Y. Partnership Law § 121-1500(d), it is subject to the same default rules as other partnerships — and has the same ability to draft around them. The LLP provision simply allows one more way in which to deviate from the standard form of partnership.

The first Limited Liability Partnership ("LLP") laws offered partners protection only from certain forms of tort liability. A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Limited Liability Partnerships and the Revised Uniform Partnership Act* at 3. But Delaware, in keeping with its "policy of becoming the most favorable state for business organizations," *id.* at 10, expanded the liability shield to cover any misconduct, tort or contract. *Id.* at 11. Other business-oriented states followed suit, and New York expanded the protection even further to shield partners from liability for essentially *all* partnership obligations of any kind. *Id.* at 12-13. By 1996, just five years after the introduction of the LLP, forty-six states and the District of Columbia had adopted LLP provisions, many offering liability protection indistinguishable from that given to corporations. *Id.* at 16.

Businesses have been quick to adopt the new form. After 127 years as a general partnership, Goldman, Sachs & Co. converted to an LLP. *Id.* All of the "Big 6" accounting firms have converted, as have thousands of other partnerships. *Id.* (even as early as 1995, over 800 law firms alone had converted). Courts throughout the country have even modified the rules governing

the legal profession to allow attorneys to practice in Limited Liability Partnerships. *See, e.g.*, Ohio Gov. Bar R. III, § 1. The wide and rapid acceptance of the new form of business partnership demonstrates the states' success in meeting the evolving needs of business.

That success, however, could be undermined if the decision below were to stand. If federal courts refuse to recognize partners as "bona fide" when they do not share in the losses and liabilities of the partnership, particularly when they have also delegated their management and control rights to others, some of the thousands of partnerships that have registered for limited liability status will no doubt find that the advantages offered by their states' laws have been completely negated by the federal courts. The states' authority to create new business structures to respond to modern business needs will be severely undermined, and laws meant to make state partnerships more secure in today's competitive marketplace will instead add to the uncertainty of a partnership's status under federal law.

II. THE SIXTH CIRCUIT'S DECISION TO FASHION FEDERAL RULES OF PARTNERSHIP LAW CONFLICTS WITH THE DECISIONS OF THIS COURT.

The many adverse effects of the decision below could have been averted if the court had simply followed this Court's teaching. When Congress fails to define a statutory term that is traditionally a matter of state law, this Court looks to the relevant state's law to determine the term's meaning. *See, e.g.*, *De Sylva v. Ballentine*, 351 U.S. 570, 580-82 (1956) (applying California family law to determine meaning of "child" in Copyright Act); *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (using New Mexico law to define "property" under Bankruptcy Act). Likewise, when Congress leaves a gap in a federal statute, this Court presumes that specific state laws should fill the gap, "particularly . . . in areas in which private parties [expect to] be governed by state-law standards," such as corporate law. *Kamen*, 500 U.S. at 98.

In *United States v. Kimbell Foods*, this Court held that the choice between using state law or fashioning federal rules to interpret a federal statute depends on (1) whether the issue requires "a nationally uniform body of law"; (2) "whether application of state law would frustrate specific objectives of the federal programs [or statutes involved]"; and (3) whether "application of a federal rule would disrupt commercial relationships predicated upon state law." *Kimbell Foods*, 440 U.S. at 728-29. There is no reason why the same principles should not apply here.

The Sixth Circuit, however, did not consider any of these principles before forging general federal rules of partnership law that are completely divorced from the myriad of state laws under which countless partnerships, including those of the *amici*, were formed. This Court's teaching, however, cannot simply be ignored. Had the lower court followed the principles applied in *De Sylva* or the analysis set forth in *Kimbell Foods*, it would have had to use the existing law of New York to provide the federal definition of "partners" who are not "employees" protected under the ADEA and ERISA. The Sixth Circuit's failure to apply these principles is directly contrary to the decisions of this Court.

A. Determining whether an ERISA or ADEA plaintiff is a bona fide partner does not require a nationally uniform rule of law.

The determination of who is a "partner," and thus not an "employee" protected by ERISA and the ADEA, is a classic example of the type of decision that this Court leaves to the "permissible variations" of state law. *De Sylva*, 351 U.S. at 581; *see United States v. Yazell*, 382 U.S. 341, 354-56 (1966) (comparing cases where Court has found need for uniform standard against those where state law sufficed). Federal statutes that use standards traditionally established by state laws — the definition of "child" or the powers of corporate directors, for example — do not require uniform federal solutions because Congress enacted the statutes "against the background of existing state law," presumably with the assumption that those state laws

would provide the controlling standards. *Burks*, 441 U.S. at 478. *See, e.g.*, *Kamen*, 500 U.S. at 98 (borrowing state law on powers of corporate directors to interpret federal securities law); *Kimbell Foods*, 440 U.S. at 728 (incorporating state commercial law to determine priority of liens arising from federal loan programs); *Burks*, 441 U.S. at 477-79 (requiring application of state corporate law to determine power of corporate directors to terminate derivative suit under Investment Company Act); *De Sylva*, 351 U.S. at 580-82 (applying state family law to determine meaning of "child" in Copyright Act).

In *De Sylva v. Ballentine*, for example, this Court looked to state law to determine whether an illegitimate child was a "child" of a deceased author, entitled to renew the author's copyright under the Copyright Act. *De Sylva*, 351 U.S. at 580. Despite the variations in state-law definitions of "child," the Court used California family law to define "child" since family law is a traditional area of state, not federal, concern:

> To decide who is the widow or widower of a deceased author, or who are his executors or next of kin, requires a reference to the law of the State which created those legal relationships. The word "child[ ]," although it to some extent describes a purely physical relationship, also describes a legal status not unlike the others. To determine whether a child has been legally adopted, for example, requires a reference to state law.

Id. Similarly, the Court in *Burks v. Lasker* held that because "[c]orporations are creatures of state law," "the first place one must look to determine the powers of corporate directors is in the relevant state's corporation law." *Burks*, 441 U.S. at 478 (quotation omitted). As this Court has consistently held, "[t]he presumption that state law should be incorporated into federal common law is particularly strong" — and thus the need for uniformity correspondingly weaker — "in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98.

Indeed, matters of traditional state-law concern have not been at issue in those cases in which the Court has found a need for national uniformity, and thus a need to create a federal rule. *Yazell*, 382 U.S. at 354-55 (describing cases finding need for uniform rule). As this Court observed in *Yazell*, the decisions choosing general federal standards "typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation." *Id.* at 354. Generally, such programs neither implicate traditional areas of state-law concern, nor involve the rights of private parties who entered legal relationships that they expected to be governed by state law.

This case, however, does both. Partnerships, like corporations and domestic relations, are creatures of state law. *Zola v. Gordon*, 685 F. Supp. 354, 364 (S.D.N.Y. 1988); *Hauer v. Bankers Trust New York Corp.*, 65 F.R.D. 1, 3 (E.D. Wisc. 1974). Since partners expect that their rights and obligations as partners will be governed by state law, federal courts have generally looked to the law of the relevant state to determine whether someone is a bona fide partner. *Fegley v. Higgins*, 19 F.3d 1126, 1132 (6th Cir.) (borrowing Michigan partnership law in holding partners jointly liable for co-partner's violation of the Fair Labor Standards Act), *cert. denied*, 115 S. Ct. 203 (1994); *Ballard v. United States*, 17 F.3d 116, 118 (5th Cir. 1994) (applying Texas law to determine if person was a partner for employment tax purposes); *In re Phillips*, 966 F.2d 926, 933 (5th Cir. 1992) (applying Texas law because defining "general partner" was "exclusively the task of state partnership law"); *In re 2111 Associates-Chicago*, 580 F.2d 705, 708 (4th Cir. 1978) (looking to Virginia law to determine meaning of "partnership" under the Bankruptcy Act). Even this Court implicitly recognized that partners expect their relationships to be governed by particular state laws when it borrowed Pennsylvania partnership law to decide whether a Pennsylvania partnership was separate entity for Fifth Amendment purposes. *Bellis v. United States*, 417 U.S. 85, 96-100 (1974).

Moreover, there simply is no need for a uniform definition of partnership under the ADEA and ERISA. Courts must already

look to state law to define "employee" under those statutes, *see Madonia v. Blue Cross & Blue Shield*, 11 F.3d 444, 449 (4th Cir. 1993) (citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992), and holding that state law must be used "[t]o discern common law principles" applicable as a result of *Darden*'s mandate to fill gaps by looking to established common-law meanings), *cert. denied*, 511 U.S. 1019 (1994), so using state law to define "partner" will not entail any extra effort in administering the statutes. *Kimbell Foods*, 440 U.S. at 729-33 (adoption of uniform federal law not warranted by administrative convenience where agency already considers state law in applying statute). There is thus no need to create a uniform federal rule of partnership.

B. Applying state partnership law to determine whether an ADEA or ERISA plaintiff is a bona fide partner would not frustrate the objectives of the ADEA or ERISA.

Congress intended the ADEA and ERISA to protect "employees" (more precisely, employees who are not specifically exempted), and *only* employees, from prohibited employment practices. *See* 29 U.S.C. § 621(b); *id.* §§ 1002(7), 1140. Neither statute protects bona fide business owners, whether partners or other employers; thus, neither statute embodies an unlimited federal policy of eradicating discrimination. *See Wheeler*, 825 F.2d at 275-76. Instead, the statutes' goals are expressly limited by the scope of their prohibitions and remedies to protecting employees.

Applying state law to determine who is or is not a partner will not frustrate the statutes' goal of protecting employees, even if it turns out that a plaintiff is a true business partner under a particular state's law, and not an employee entitled to sue under the ADEA or ERISA. State law "cannot be considered 'inconsistent' with federal law merely because [it] causes the plaintiff [in a particular case] to lose the litigation." *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978); *see also Burks*, 441 U.S. at 479. Moreover, there is nothing irrational or inequitable about denying partners the same protection against discrimination or

retaliation that is afforded to employees. As the Fifth Circuit has explained, "[e]mployees in the traditional employer-employee relationship are more vulnerable than partners in a partnership are to abuses because . . . a partner has more control and input than does an employee." *Robertson*, 798 F.2d at 870. Moreover, partnerships "contain[ ] a self-policing feature largely absent in the typical employer-employee relationship" because "partners have an incentive not to agree to provisions that may harm certain members of the partnership because each partner knows that he could end up being the partner who is harmed." *Robertson*, 798 F.2d at 870. And to the extent that partners find it expedient to delegate their control to a managing partner or to a management committee, which will often be the case in large partnerships, there is every reason to honor their "abdication of rights" if it is valid under generally applicable state partnership law. *Wheeler*, 825 F.2d at 274. *See also Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1044 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986).

Although it would frustrate federal anti-discrimination laws and ERISA to permit employers to avoid their strictures by merely labeling their employees as "partners," no state attaches talismanic significance to whether or not the parties term their relationship a "partnership." *See generally* I A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership* § 2.05(c), at 2:56, 59-60. Certainly, the State of New York does not. *See, e.g.*, *Martin v. Peyton*, 158 N.E. 77, 78 (N.Y. 1927) (holding that, because express statements in contracts "may be a mere sham to hide the real relationship," express statements regarding partnership intent "are not conclusive" because "[m]ere words will not blind us to the realities"); *Brodsky v. Stadlen*, 526 N.Y.S.2d 478, 480 (App. Div. 1988) ("It should be noted that calling an organization a partnership does not make it one."). Absent such a situation, there is no federal objective that is frustrated in any way by applying and giving controlling effect to the pertinent state business-associations law in deciding whether an individual is an "employee" or a "partner" for these purposes.

See De Sylva, 351 U.S. at 581 (as long as state does not define "child" in a way contrary to ordinary usage, state law controls).

C. Applying a federal definition of "partner" under the ADEA and ERISA would disrupt commercial relations predicated upon state partnership law.

Because partnership agreements are drafted against the background of state partnership law, there is ordinarily a substantial degree of certainty in forming partnerships: so long as the detailed provisions of the state's law are followed, a valid partnership will result. Business people form partnerships with the expectation that the law of the particular state where they are organized will govern their rights, obligations, and dealings as partners. *Cf. Kimbell Foods*, 440 U.S. at 739-40 (businessmen depend on state commercial law in structuring financial transactions). That expectation, however, would be upset by the application of a general federal rule of partnership that differs from the state's rules.

Having competing rules of partnership under federal and state law would inject uncertainty into partnership formation and place dealings among partners "under a federally created cloud." *BFP v. Resolution Trust Corp.*, 511 U.S. at 544. Under the Sixth Circuit's decision, for example, partners who relied on their state partnership law to form a limited liability partnership with centralized management could now find that those partners who delegated their management rights, and thus have neither management control nor personal liability for partnership losses, are employees for some purposes under federal law, but partners for other purposes under state law. Such a state of affairs would be "potentially chaotic," as the Tenth Circuit has explained, because "no one [would] ever quite know[ ] who is an employee/partner and who is a "'pure' partner." *Wheeler*, 825 F.2d at 274.

Moreover, the existence of a competing body of federal partnership law would impair the ability of states to adapt their business associations laws to the ever-changing needs of the modern economy. Courts should not deal such a blow to federal-

ism (much less commerce and freedom of association) without clear direction from Congress. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (applying this principle to exclude state judges from the scope of the ADEA). Indeed, as then-Judge Ruth Bader Ginsburg wrote in a joint opinion with one of her colleagues: "[I]f Congress intended displacement of state law . . . one would expect to find a clear statement to that effect. Particularly in an area traditionally in the state's domain, such as sales law, the likelihood is that the national legislature, when it intervenes, and does not say otherwise, opts for the little rather than the much." *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (footnote omitted), *cert. denied*, 482 U.S. 915 (1987).

D. The Sixth Circuit should have applied state law to determine whether Simpson was a "partner."

Because there is no need for uniform rules of partnership under federal employment statutes like the ADEA and ERISA, the Sixth Circuit should have followed the analysis of *Kimbell Foods* before fashioning a general federal rule of decision. If it had, it would have considered whether the application of state law would frustrate the goals of the ADEA and ERISA and, conversely, whether the application of federal rules defining "partnership" would disrupt commercial relationships based on state law. The Sixth Circuit, however, made no such analysis before creating its general federal rules for partnership. *See Simpson*, 100 F.3d at 443-44.

This mistake was no mere technical error on the part of the Court of Appeals. Even if it is true that "the general indicia of partners and partnerships are very similar across state lines," *Wheeler*, 825 F.2d at 267, the fact remains that partnership laws do vary, to a greater or lesser degree, from state to state. *See* I A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership* § 1.02(b), at 1:27 ("Despite the prevalence of the U.P.A. and the R.U.P.A., and their exhortations for uniform interpretation, there are variations in the wording of the acts as passed by the several legislatures and in the way the act has been construed by the courts.") (footnotes omitted). Because such "nuance[s] can

be important" even if the laws of the various states otherwise bear much in common, a federal court simply cannot abstract general principles of law as a substitute for a detailed analysis of the law of the relevant state. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.), *cert. denied,* 116 S. Ct. 184 (1995). When this Court's decisions require the incorporation of a specific state law — New York law — as the federal rule of decision in interpreting a term in federal law, the Sixth Circuit is simply not free to refer instead to some generalized version of state law.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

This brief *amici curiae* is submitted on behalf of the following law firms.

Arnold & Porter (a D.C. partnership)
Davis Polk & Wardwell (a New York partnership)
Dickinson, Wright, Moon, Van Dusen & Freeman (a Michigan partnership)
Fried, Frank, Harris, Shriver & Jacobson (a New York partnership)
Fulbright & Jaworski L.L.P. (a Texas registered limited liability partnership)
Jones, Day, Reavis & Pogue (an Ohio partnership)
King & Spalding (a Georgia partnership)
Latham & Watkins (a California partnership)
O'Melveny & Myers LLP (a California limited liability partnership)
Paul, Hastings, Janofsky & Walker LLP (a California partnership)
Seyfarth, Shaw, Fairweather & Geraldson (an Illinois partnership)
Shearman & Sterling (a New York partnership)
Skadden, Arps, Slate, Meagher & Flom LLP (a New York limited liability partnership)
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